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No. _____

In the Supreme Court of the United States

October Term, 1981

RONALD EDWARD SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A WARRANT WAS REQUIRED TO SEARCH AN AIRCRAFT THAT HAD LANDED ON PRIVATE PROPERTY, WHERE THE AIRCRAFT WAS UNOCCUPIED AT THE TIME POLICE ARRIVED AND WAS IMMOBILIZED BY A CONTINGENT OF POLICE WHERE THERE WAS NO DANGER OF IT BEING ENTERED OR MOVED.

II. WHETHER EVIDENCE FROM A VEHICLE LOCATED THROUGH THE FRUITS OF PETITIONER'S ILLEGAL ARREST, WHERE THE VEHICLE WAS SEIZED WITHOUT PROBABLE CAUSE BUT NOT SEARCHED UNTIL THE FOLLOWING DAY WHEN PROBABLE CAUSE AROSE, COULD BE RECEIVED IN EVIDENCE.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Ronald Edward Smith, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on February 19, 1982.

OPINION BELOW

The opinion of the Court of Appeals, which is unpublished, appears in the Appendix hereto. No opinion was rendered by the United States District Court for the Middle District of Alabama.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 19, 1982, affirming petitioner's conviction of February 13, 1981. The Court of Appeals denied a timely petition for rehearing on March 25, 1982. On May 18, 1982, Justice Powell signed an order extending the time for filing this petition for certiorari to and including June 9, 1982. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254(1).

LIST OF ALL PARTIES IN THE COURT BELOW WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

In addition to the petitioner, the following, who are not named in the style of this case, were named defendants in the United States District Court for the Middle District of Alabama, the court of first instance.

Julius Cecil Olson
Dan Fowler
William Larry David
Samuel Mark Wylie, III

QUESTIONS PRESENTED FOR REVIEW

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CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner RONALD EDWARD SMITH was convicted of conspiracy to import marijuana (21 U.S.C. §963); importation of marijuana (21 U.S.C. §§952(a) and 960(a)(1)); conspiracy to possess marijuana with intent to distribute (21 U.S.C. §846); and possession of marijuana with intent to distribute (21 U.S.C. §841(a)(1)).

According to the government's theory of the case, in August-September 1979, co-defendant Dan Fowler suggested to co-defendant (and government witness) Samuel Mark Wylie, III, that Wylie could make some easy money by locating airstrips "to bring in marijuana." Fowler subsequently introduced Wylie to Stephens, a pilot, and Wylie showed them two airstrips in the Opelika, Alabama, area.

Around April 1980 an agreement was

reached between Wylie and Stephens whereby Wylie was to receive $1,000.00 each time a marijuana plane landed. Several discussions followed until the plans were frustrated by Stephens' untimely death in July 1980. Fowler then introduced the petitioner and his co-defendants (Olson and David), who were in no way related to the original conspiracy, to Wylie in late September 1980.

Subsequently, during the afternoon hours of October 15, 1980, Brenda Huey observed a twin engine airplane, of which petitioner was co-pilot, land on the Huey's private airstrip adjacent to her home[1] and taxi off the airstrip out of sight to the vicinity of the Huey hangar. Mrs. Huey peered around the

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[1] Contrary to the finding by the Court of Appeals (App. 13), the farm was not in a remote area (TR 69-70); G.Ex. 14).

hangar and observed two men off-loading small cardboard boxes from the plane onto a pickup truck, one man urging the other to hurry. The plane's engines were shut down.

Concerned, Mrs. Huey phoned her husband's business partner, Mr. Wilson, who summoned the police, then drove to the Huey farm. En route, Wilson observed co-defendant Olson seated alone in an Oldsmobile in the parking lot of Bishop's grocery store near the Huey place. Because he felt Olson eyed him suspiciously, Wilson recorded his license tag number. Just before reaching the farm, Wilson met Wylie (a Huey-Wilson employee) with two passengers in the company pickup truck whom Wylie identified as friends who had just landed a plane at the Huey's farm (with permission previously obtained from Mr. Huey by Wylie). After meeting Wylie,

Wilson continued on to the Huey farm and, upon arrival, notified the police to disregard his call.

Shortly after Wilson arrived at the Huey farm, Wylie returned with only one passenger, Olson, whom Wilson had seen in the Oldsmobile at Bishop's store. Wylie told Huey and Wilson that he had just picked up Olson at the Mariner Inn, which Wilson did not believe. Wylie and Olson then drove to the airplane.

Shortly, Officer Sumners of the Opelika Police Department arrived and, according to his testimony, was advised by Mrs. Huey that she had observed four men (Mrs. Huey claims she only saw two men (TR 93)) unloading boxes from a twin engine plane onto a truck. Sumners phoned for help, then drove to the plane where he took Olson and Wylie, who were standing near the plane, into custody and

observed there were no persons on board the aircraft. He noted that there were three seats from the aircraft on the ground. Within minutes, two more officers and three detectives arrived, one of whom was ordered to "not to let anybody on the plane" until the other returned from interviewing Mrs. Huey and Mr. Wilson.

In the meantime, numerous other officers (estimated by one witness to be anywhere from 15 to 40 officers) had arrived at the plane.

In speaking with police, Olson mentioned repossessing the airplane but refused to elaborate when questioned further. A detective observed what he believed to be marijuana on the top step of the airplane. He then entered the plane and found marijuana residue on the carpet. The keys to the plane were recovered by police when found partially

covered with dirt near Olson's feet, some twenty feet from the plane. In their testimony, the officers conceded that the area was secure and that nothing prevented them from applying for a warrant to any of several admittedly readily available judicial officers.

The craft was flown that evening from the Huey airstrip to the Auburn-Opelika Airport where it was searched and processed for fingerprints and marijuana residue (less than .007 ounces being found in the search of the aircraft and the automobile, infra). During the earlier search, petitioner's denture, as well as other crucial items of evidence linking him to the plane and the charged offenses, were recovered from the cockpit and passenger area.

While the police were at the Auburn-Opelika Airport searching the plane, a

charter pilot became suspicious of two men (petitioner Smith and co-defendant David) desiring to hire him to fly co-defendant David tc Georgia. Learning of this, the police arrested the men and searched petitioner, finding keys to the Oldsmobile. Based upon the keys (which the trial court correctly suppressed as fruit of an illegal arrest), the police searched for and located the Oldsmobile at the airport, seizing and towing it to a security area at the jail, but not searching it until the following day when probable cause arose based upon the post-seizure, late evening confession of co-defendant Wylie.

During the search of the Oldsmobile, evidence crucial to linking petitioner to the automobile, the aircraft and the charges was recovered from the automobile.

Following his arrest, petitioner was

held incommunicado until the following afternoon, being denied a bond hearing, telephone calls or other outside contacts.

BASIS OF JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction of the United States District Court for the Middle District of Alabama was invoked under the provisions of Title 18, United States Code, Section 3231.

REASONS FOR GRANTING THE WRIT

I. THE DECISION TO ADMIT EVIDENCE RECOVERED FROM THE UNOCCUPIED AIRCRAFT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT AS TO THE PROPER APPLICATION OF COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443 (1971), AND ITS PROGENY.

In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures (applicable to the states through the Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23 (1963)), this Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable cause issue and the issuance of a warrant before a search is made, recognizing that the warrant requirement is a valuable

and cherished protection against unreasonable intrusion. Chambers v. Maroney, 399 U.S. 42 (1970). Only in exigent circumstances will the judgment of police as to probable cause serve as sufficient authorization to search.

Carroll v. United States, 267 U.S. 132 (1925), holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway. The rationale for the exception is that the car is movable, the occupants are alerted, and the car may be taken from the jurisdiction and never found again or the instruments or fruits of a crime may be removed if a warrant must be obtained. In Carroll, the car's occupants had not been arrested and the distance involved to procure a magistrate's signature on a warrant was significant so the likelihood of removal of the vehicle was

very real.

In Coolidge v. New Hampshire, 402 U.S. 443 (1971), following petitioner's arrest, his automobile, which had been parked in his driveway, "plainly visible from the street" (at 448), was towed to the station-house and searched without a warrant. Petitioner's claim here, analogous to that raised in Coolidge, is that the seizure and subsequent search of the aircraft (which has been equated in judicial decisions with an automobile for purposes of searches and seizures, United States v. Sigal, 500 F.2d 1118, 1121-23 (10th Cir.), cert. denied, 419 U.S. 954 (1974)), under circumstances akin to those in Coolidge, was invalid because such search was conducted without a warrant.

The most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval

by judge or magistrate, are per se, unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). The exceptions to the rule that a search must rest upon a search warrant are "jealously and carefully drawn" (Jones v. United States, 357 U.S. 493, 499 (1958)), and there must be "a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." McDonald v. United States, 335 U.S. 451, 456 (1948). "[T]he burden is on those seeking the exemption to show the need for it." United States v. Jeffers, 342 U.S. 48, 51 (1951). Such exceptions to the warrant requirement must be cautiously guarded to insure the right of personal security against arbitrary intrusions by official power. In

so doing, the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended. Johnson v. United States, 333 U.S. 10 (1948).

The first arguable justification for seizing and searching petitioner's aircraft when two co-defendants were arrested at the landing strip was that the seizure and search were incident to the arrests. Under Chimel v. California, 395 U.S. 752 (1969), the lawful arrest of these suspects outside the aircraft could never by itself justify a warrantless search inside the plane. This result is not changed by the decision in New York v. Belton, 453 U.S. 454 (1981), under the facts of this case. Search-incident

doctrine has no applicability to this case.

The second arguable justification for the warrantless seizure and subsequent search of petitioner's aircraft is that under Carroll v. United States, 267 U.S. 132 (19-25), the police may make a warrantless search of an automobile whenever they have probable cause to do so, and, by analogy, of an aircraft because its mobility makes it likewise easily removable.

But even granting that the police had probable cause to search the plane, the application of the Carroll case to these facts, as stated in Coolidge v. New Hampshire, 403 U.S. 443 (1971), "would extend it far beyond its original rationale."

The application of the Carroll doctrine, as characterized in Chambers, to unoccupied, parked cars, has been particularly troublesome

for this Court. The plurality in Coolidge struck down the search of an unoccupied car parked on private property, and appeared to restrict its predecessor, Chambers, to searches preceded by a valid Carroll stop, i.e., to vehicles stopped while moving on the open highway. Another plurality opinion, however, relied directly on Chambers to uphold the warrantless seizure of an unoccupied car parked in a public parking lot, and refused to attach any significance to the lack of a prior Carroll stop. See Cardwell v. Lewis, 417 U.S. 583, 594 (1974):

> The fact that the car in Chambers was seized after being stopped on a highway, whereas Lewis' car was seized from a public parking lot, has little, if any, legal significance.

This plurality opinion stated that Coolidge was distinguishable from Chambers because

Coolidge involved entry on private property (a driveway), whereas in Chambers "the automobile was seized from a public place where access was not meaningfully restricted." 417 U.S. at 593.

The Cardwell plurality also claims that this was the ground on which Coolidge plurality distinguished Chambers, a statement hard to reconcile with footnote 20 of Coolidge read in full.[2] Chambers is of no help to the State since that case held only that, where the police may stop and search an automobile under Carroll, they may also seize it and search it later at the police station.

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[2] Part III-B of the concurring and dissenting opinion of Mr. Justice Black argues with vehemence that this case must somehow be controlled by Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, yet the precise applicability of Chambers is never made clear. On its face, Chambers purports to deal only with situations in which the police may legitimately make a warrantless search under Carroll

(footnote continued on following page)

It is noted that all of the Justices comprising the Coolidge plurality dissented in Cardwell. The emphasis in footnote 20 seems to be on the initial Carroll stop in Chambers,

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(footnote continued from preceding page) v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543. Since the Carroll rule does not apply in the circumstances of this case, the police could not have searched the car without a warrant when they arrested Coolidge. Thus Mr. Justice Black's argument must be that Chambers somehow operated sub silentio to extend the basic doctrine of Carroll. It is true that the actual search of the automobile in Chambers was made at the police station many hours after the car had been stopped on the highway, when the car was no longer movable, any "exigent circumstances" had passed, and, for all the record shows, there was a magistrate easily available. Nonetheless, the analogy to this case is misleading. The rationale of Chambers is that given a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of whether the initial intrusion is justified. For this purpose, it seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose. That the police may have been legally on the property in order to arrest Coolidge is, of course, immaterial, since, as shown in II-A of the text, supra, that purpose could not authorize search of the car even under United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653.

contrasted with the fact that the car in Coolidge was parked and unoccupied. While the location of the car on private property is set forth as a fact in the case, Coolidge does not, at least overtly, identify this as a fact of crucial legal importance.

The Supreme Court's more recent per curiam in Texas v. White, 423 U.S. 67 (1975), did not effect this needed reconciliation of Coolidge and Cardwell. Texas v. White reiterates and extends the ruling of Chambers, that if an immediate search of the scene is permissible, a later search at the stationhouse can be made without a warrant. Since the case involved a moving car that had been stopped, all the Justices began with the premise that an immediate search at the scene would have been permissible; their focus was on the validity of the stationhouse search.

This is made clear by the majority's reference to the following language in Chambers:

> On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for the search. The probable-cause factor still obtained at the stationhouse and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. 399 U.S. at 52 (emphasis supplied).

The underlying reasoning of Carroll and subsequent cases following it is that there is . . .

> a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality

> or jurisdiction in which the warrant must be sought. 267 U.S. at 153. (Emphasis supplied)

It is frequently said that automobiles may be searched without a warrant merely because they are "mobile" or "movable". No constitutional significance should attach to this type of mobility inasmuch as a good number of containers that the police might discover on a person's property and want to search are equally movable. The word "automobile" (or "airplane") is not a talisman in whose presence the Fourth Amendment fades away and disappears.

Here, unlike Carroll where the opportunity to search was fleeting, the aircraft was shut down on a private airstrip, surrounded by fifteen to forty police officers, with all co-defendants who reasonably had

access to the plane taken immediately into custody, all prior to the plane being searched. It was then flown to a commercial airport and safely ensconced in a hangar, under police control, where it was more thoroughly searched. The opportunity for search was thus hardly "fleeting". There was no way anyone other than law enforcement officers officially engaged in the investigation of the case could conceivably have gained access to the aircraft once police had arrived on the scene.

The very term "exigency" commands that analysis be shaped by the realities of the situation. The plurality in Coolidge rejected speculative, far-fetched exigencies based on potential mobility:

> In this case, it is, of course, true that even though Coolidge was in jail, his wife was miles away in the company of two plain-clothesmen,

> and the Coolidge property was under the guard of two other officers, the automobile was in a literal sense "mobile." A person who had the keys and could slip by the guard could drive it away. We attach no constitutional significance to this sort of mobility. 403 U.S. at 461 n.18.
>
> Mobility potential, however, can spawn an exigent situation if the police have insufficient manpower to post a guard as an assurance of continued immobilization. See United States v. Free, 437 F.2d 631, 635 (D.C. Cir. 1970). However, here the record reveals a surfeit, not a shortage, of police officers involved in the investigation.

Additionally, here it is uncontested that numerous, specifically identified judicial officers were available to consider the merits of issuing a search warrant. (Supp.H. 66).

In sum, by no possible stretch of the imagination can this be made into a case where "it is not practicable to secure a warrant." Carroll, supra, at 153.

Since Carroll would not have justified,

and Coolidge would have prohibited, the warrantless search of the aircraft at the time it was first seized on the private strip, the later search at the airport hangar was plainly illegal, as no exigent circumstances that would have justified the police in proceeding without a warrant existed in either instance.

For the automobile (or "mobile aircraft") exception to apply, the government must show that at the time of the warrantless seizure and search the officers had reason to believe that the mobility or exposure of the plane made it impracticable to seek a warrant. Warden v. Hayden, 387 U.S. 294 (1967). This it cannot do.

CONFLICT AMONG CIRCUITS

In United States v. Payne, 429 F.2d 169

(9th Cir. 1970), two couples were camping in an individually allotted campsite in Yosemite National Park. During the evening, an off-duty policeman camping with his family in an adjoining site observed the two couples smoking a substance he believed to be marijuana and also observed them making what he thought were "furtive" movements to remove objects he thought to be drugs from the glove compartment of a car parked nearby. He summoned a park ranger, and the two entered the campsite. They found that one of the couples was preparing to bed down for the night, while the couple to whom the car belonged was visiting in another campsite. The officers searched the unoccupied parked automobile, found 12 seconal capsules, and arrested the couple who had stayed behind. The government attempted to uphold the search

under Carroll, supra. The Court of Appeals answered (at 171-172):

> While it is true that the Supreme Court has enunciated slightly different rules concerning a search of an automobile without a warrant, the rationale is apparently based upon the fact that a "vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Chimel v. California, 395 U.S. 752, 764 . . . . In the instant case the search of the Volkswagen cannot be justified upon this reasoning. There is no indication in the record that the appellant or any of his party were preparing to leave, and quite to the contrary it is clear that appellant was bedding down for the evening and that there was ample time to secure the necessary warrant for a search of the car had Ranger Wolfe believed there was probable cause to seek one.

See also United States v. Williams, 630 F.2d 1322 (9th Cir.), reh. denied, cert. denied, 449 U.S. 865 (1980).

And, in United States v. Fogelman, 586 F.2d 337 (5th Cir. 1978), petition for re-

hearing en banc denied, 590 F.2d 786 (1979), marijuana was taken from a boat and, while under surveillance by government agents, loaded onto four trucks, two of which were driven to the Motel One in Atlanta under constant surveillance. The other two trucks were seized in Savannah and found to contain bales of marijuana. Shortly thereafter, as drivers of the Atlanta trucks left the Motel One, they turned and waved at the surveilling agents. Because of this believed-to-be gesture of recognition, the drivers were arrested. Learning of the discovery in the Savannah trucks, the agents seized and opened the two trucks in Atlanta and verified that they contained marijuana. The government again attempted to uphold the search and seizure under Carroll, supra. The Court of Appeals answered (at 342):

> Such exigency did not exist in the case at hand. With numerous officers around the premises and the two drivers in custody, there was no threat that the trucks were likely to be moved or their contents lost.

The Court further stated (at 343) that "This Circuit has recognized that Chambers [Chambers v. Maroney, 399 U.S. 42 (1970)] is limited to highway stops. See United States v. Chapman, 5 Cir., 1973, 474 F.2d 300; United States v. Ragsdale, 5 Cir., 1972, 470 F.2d 24."

And, in United States v. Kelly, 547 F. 2d 82 (8th Cir.), reh. denied (1977), that Circuit held (at 84):

> No exigent circumstances were present here. Kelly was arrested inside his motel room and immediately placed in handcuffs. The car was unoccupied and parked on private property. There was no showing that a friend or confederate existed to whom the location

of the car could be reported and who would be able to remove the car. Absent exigent circumstances, a warrant is required.

In footnote 5, the Court went on to state:

The fact that the car was parked outside his motel room is hardly distinguishable from the facts of Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In that case, the Supreme Court held invalid the search of the defendant's car which had been parked in the driveway of his home. The Court stated:

> [I]t seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose. Coolidge v. New Hampshire, supra at 463, n.20, 91 S.Ct. at 2036.

We do not find Cardwell v. Lewis, 417 L.Ed.2d 325 (1974), which upheld a less intrusive search of a car exterior after the car had been seized from a public parking lot, to be to the contrary.

In so holding, the Fifth, Eighth and Ninth Circuits' interpretations of the need for a search warrant where an otherwise "mobile" vehicle is unoccupied, under the complete control of police authorities, and not susceptible, under any view of the circumstances, to being entered or moved, are in conflict with the holding of the Eleventh Circuit in the present case that "it was impracticable to obtain a warrant since the craft could have been quickly moved out of the area" (App. 12), which also conflicts with the holding of Coolidge v. New Hampshire, supra, inasmuch as the existence of probable cause must be accompanied by factors rendering the warrant procedure impracticable. Warden v. Hayden, supra. Such circumstances were absent here.

If the decision herein is permitted to

stand, the Eleventh Circuit will establish a precedent that the mere inherent mobility of automobiles and aircraft, in and of itself, without more, constitutes an "exigent circumstance" dispensing with the warrant requirement.

This case offers the Court an opportunity to clarify the law in the area of automobile/aircraft searches, which "branch of the law is something less than a seamless web" (Cady v. Dombrowski, 413 U.S. 433, 440 (1973)), subverting esteemed Fourth Amendment protections in an attempt by various courts, including the Court of Appeals in this case, "to reach what are perceived as the correct results in specific cases." Rakas v. Illinois, 439 U.S. 128, 156 (1978).

II. THE TRIAL COURT ERRED IN APPLYING THE INDEPENDENT SOURCE/INEVITABLE DISCOVERY EXCEPTIONS TO THE "FRUIT OF THE POISONOUS TREE" DOCTRINE, THEREBY PERMITTING INTRODUCTION OF EVIDENCE SEIZED FROM PETITIONER'S AUTOMOBILE WITHOUT PROBABLE CAUSE.

A.

BACKGROUND

From the record in this case it cannot be disputed but that petitioner Smith was illegally arrested on the evening of October 15, 1980, at the Auburn-Opelika Airport. The trial court, after conducting hearings into the facts and circumstances of the arrest, suppressed all evidence resulting therefrom (R. 136). Cf. Weeks v. United States, 232 U.S. 383 (1914); Delaware v. Prouse, 440 U.S. 648 (1979); Wong Sun v. United States, 371 U.S. 471 (1963).

At the time of the illegal arrest, pe-

titioner was searched, resulting in the recovery of the keys to his 1972 Oldsmobile and his contemporaneous statement that he had driven the car to the airport. Armed with this information, the officers began a search of the airport parking lot where they found the Oldsmobile and confirmed its identity as the one suspected by inserting the key and testing the door lock. The vehicle was then towed to the police station where it was searched the following afternoon, once probable cause developed from a co-defendant's post-seizure confession. From the search, crucial evidence was recovered and admitted against petitioner during trial.

B.

ABSENCE OF PROBABLE CAUSE

Prior to the illegal arrest of petitioner and the seizure of his keys, the in-

formation possessed by police was essentially that Mr. Wilson had observed an Oldsmobile (the license number of which he gave to the police) containing a suspicious-looking male in the parking lot of Bishop's Store, along with several other automobiles (T. 121, 154, 155), in the vicinity of the Huey place; that two unidentified men who were seen unloading the aircraft which was observed to have a minute amount of suspected marijuana on its stair were unaccounted for; and, after locating the Oldsmobile following the illegal seizure of petitioner's keys, the officers observed a radio, the top to a radio, boots, a briefcase, several glasses and some beer cans in the vehicle.

Although this issue (i.e., the absence of probable cause) was raised in the Court of Appeals, it was completely ignored in that

Court's lengthy opinion.

The test to be applied before seizing an automobile and searching it for its contents is whether there was a "substantial basis" at the time the vehicle was seized (as opposed to a later time when probable cause did arise following the interrogation of co-defendant Wylie) to believe that it contained contraband, evidence, or fruits or instrumentalities of a crime. Aguilar v. Texas, 378 U.S. at 111 (1964). Here, at the time of the seizure, such basis did not exist; the mere fact that evidence was recovered as a result of a search based upon nothing more than suspicion can in no way justify the search. Wong Sun v. United States, supra.

C.

INDEPENDENT SOURCE
AND
INEVITABLE DISCOVERY

Petitioner next submits that irrespective of the existence of probable cause, the police officers' discovery of his Oldsmobile in the airport parking lot was a fruit of his illegal arrest wherein the officers recovered his vehicle keys which led them to search for, locate and seize the automobile at the airport.

In order to uphold the seizure and subsequent search, the Court of Appeals erroneously relied first upon the doctrine of independent source, asserting that the police had information independent of the unlawful arrest that led to the discovery of the Oldsmobile. Such a finding is simply unsupported by the record. While the police had a description of the automobile from an independent source, they had no information to lead them to the <u>whereabouts</u> of the Oldsmobile un-

til they illegally arrested petitioner and from him gained evidence and information that led to the location of the vehicle. The "independent source" which is referred to at best only supports an inference that the automobile might eventually have been located.

To circumvent the absence of support in the record for reliance upon the independent source theory, the Court of Appeals went further, holding that the police "would inevitably" have discovered the Oldsmobile which "inevitability" supposedly overcame the taint resulting from the illegal search of petitioner and discovery of his keys. (App. 17).

This seldom used concept of "inevitable discovery" first appeared in Somer v. United States, 138 F.2d 790 (2nd Cir. 1943), and has followed a rocky course ever since.

Although this Court has never clearly accepted the inevitable discovery concept as a rule of law, an invitation for its consideration was extended in Brewer v. Williams, 430 U.S. 387, 406 (1977), where this Court suggested (at n.12):

> While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. Cf. Killough v. United States, 119 U.S. App. D.C. 10, 336 F.2d 929. In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted.

The present case presents a scenario wherein the evidence (not the automobile itself, but those items that were discovered

inside the automobile) would not have been available to the police had they not illegally arrested the petitioner and his companion and seized his vehicle which was held until the following day when sufficient probable cause arose for the issuance of a warrant. There is no showing in the record, nor logically could there be, that the automobile's contents would have been available for lawful seizure at the time probable cause eventually arose had petitioner not been arrested and held incommunicado until the following afternoon.

By ignoring these realities, the Court of Appeals has permitted the officers to accomplish by illegal means that which they could not do within the bounds of the Fourth Amendment. The Court of Appeals, perhaps realizing that the inevitable discovery doc-

trine, if it be such, hung by a very tenuous thread under the facts of this case, applied what had to be, at best, a "mere possibility" test in order to reach the conclusion that the evidence from the automobile "would have inevitably" been discovered. (App. 17).

The objection to even the existence of the inevitable discovery rule is that it is, in most instances, based upon conjecture, "results in a speculative theory with no discernible limits" (Comment, 31 U.Miami L.Rev. 615, 627 (1977)), and can only encourage police shortcuts whenever evidence may be more readily obtained by illegal than by legal means (Note 74, Colum.L.Rev. 88, 99 (1974)), and thus collides and is completely at odds with the fundamental purpose of the exclusionary rule. If the police will only be deprived

of that evidence which the defendant can show they would not have been able to obtain had they not engaged in the illegality, they will in no way be deterred from such conduct; all they will stand to lose is what they would not have otherwise had and they might gain some advantage if something slips by. Moreover, the illegal route is often faster and easier than the legally required route.

While the inevitable discovery exception to the taint doctrine may have some viability in limited cases, for example, where the police can show that the evidence would continue to exist and, therefore, be subject to seizure once their investigation "inevitably" led them to it (People v. Payton, 380 N.E.2d 224 (C.A.N.Y. 1978), rev'd on other grounds, Payton v. New York, 445 U.S. 573 (1980) [records reflecting purchaser of firearm required

by law to be maintained by vendor and, therefore, not subject to destruction by suspect]; United States v. Bienvenue, 632 F.2d 910 (1st Cir. 1980)[records of tickets maintained by travel agent and, therefore, not subject to destruction by suspect]), or where it can be shown that a law enforcement agency would have acquired information through required statutory procedures (People v. Soto, 285 N.Y.S.2d 166 (Sup. Ct. Queens County 1967) [where suspect confessed to a fatal stabbing after inadequate Miranda warnings and admitted placing knife in mailbox near scene of crime, it was held that the murder weapon could be introduced against him at trial because, under postal regulations, a foreign object must be turned over to the police when found in a mailbox. The Court was satisfied that the only effect of defendant's state-

ments was to accelerate the discovery of the evidence]), it has no applicability here where, realistically, had petitioner not been unlawfully arrested, his questioning by police would have alerted him to conceal what the police found in his vehicle.

Regarding application of the rule once it is found to exist, the majority of the courts that have utilized the exception have tended to define the necessary probability in terms of "would" (but cf. People v. Payton, supra, where "very high degree of probability" test used), and that requirement must be strictly adhered to. See, e.g., United States ex rel Owens v. Twomey, 508 F. 2d 858 (7th Cir. 1974); United States v. Falley, 489 F.2d 33 (2nd Cir. 1973); Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964).

The significance of the word "would"

cannot be overemphasized. It is not enough to show that the evidence "might" or "could" have been otherwise obtained. Once the illegal act is shown to have been in fact the sole effective cause of the discovery of certain evidence, such evidence is inadmissible unless the prosecution severs the causal connection by an affirmative showing that it would have acquired the evidence in any event. In order to avoid the exclusionary rule, the government must establish that it has not benefited by the illegal acts of its agents; a showing that it might not have so benefited is insufficient. But this requires somewhat greater care than the Court of Appeals here has taken. In carving out the "inevitable discovery" exception to the taint doctrine, courts must use a surgeon's scalpel and not a meat axe. For one thing,

it is essential that the courts not lose sight of the fact that a mechanical application of the inevitable discovery doctrine will encourage unconstitutional shortcuts. Note, 5 Hofstra L.Rev. 137, 159 (1977).

D.

CONFLICT AMONG CIRCUITS

The Fifth Circuit previously rejected the "inevitable discovery" theory saying, in United States v. Villarreal, 565 F.2d 932, 942 (5th Cir.), reh. & reh. en banc denied, cert. denied, 439 U.S. 824 (1978):

> We rejected the inevitable discovery rule because it requires speculation by the Court as to what would have happened had the illegality not occurred.

And, stating in United States v. Castellana,

488 F.2d 65, 68 (5th Cir.) rev'd on other grounds, 500 F.2d 325 (5th Cir. 1974)(en banc):

> To admit unlawfully obtained evidence on the strength of some judge's speculation that it would have been discovered legally anyway would be to cripple the exclusionary rule as a deterrent to improper police conduct.

That Circuit has recently produced two panel decisions accepting the inevitable discovery rule but applying a "reasonable probability" of inevitable discovery standard. United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980); United States v. Miller, 666 F.2d 991 (5th Cir. 1982).

The Ninth Circuit, in United States v. Wiga, 662 F.2d 1325, 1333 n.9 (9th Cir. 1981), has affirmed the "would have" standard.

The Seventh Circuit, in United States ex rel Owens v. Twomey, supra, likewise applied

a "would have" test to the inevitable discovery doctrine.

The First Circuit, in United States v. Bienvenue, supra, likewise applied the "would have" test, finding that agents would have located certain illegally seized evidence while executing a subsequently validly obtained search warrant.

The Eleventh Circuit, in formulating its version of the inevitable discovery doctrine in this case, has simply applied the meat axe and created a "possibility that the evidence would inevitably have been discovered" test.

There is simply no showing, nor can there be, that, absent the primary illegality of petitioner's arrest, the critical evidence seized from the car itself would have ultimately been found and seized. See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392

(1920).

It is oft forgotten that the concept of exceptions to the taint rule were given birth in Wong Sun, supra, where this Court was careful to limit the material application of those doctrines:

> In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person ... this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. Weeks v. United States, 232 U.S. 383. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions. Silverthorne Lumber Co. v. United States, 251 U.S. 385. Mr. Justice Holmes, speaking for the Court in that case, in holding that the Government might not make use of information obtained during an unlawful search to subpoena from the victims the very documents illegally viewed, expressed succinctly the policy of the broad exclusionary rule:
>
> "The essence of a provision forbidding the acquisition of evidence

> in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." 251 U.S. at 392.

It is submitted that the Court of Appeals here cast aside the teachings of Weeks, supra, and its progeny in reaching its decision in this case. It is suggested that this Honorable Court should definitively take a position on the existence or non-existence of the inevitable discovery doctrine and, if it be found viable, then set forth the standards to be followed by all courts in assessing inevitability.

Petitioner incorporates herein his argument appearing under Reason I above as such argument would apply to the seizure of the automobile herein, which occurred absent any exigent circumstances. The evidence clearly shows that all suspects were in custody, the vehicle was under the total dominion and control of the arresting officers and there was no possibility, let along any likelihood, that the vehicle could or would have been moved or tampered with prior to the obtaining of a search warrant. United States v. Kelly, supra.

CONCLUSION

In conclusion, petitioner requests the Supreme Court issue its Writ of Certiorari to the Court of Appeals for the Eleventh Circuit to review the issues presented in this case.

Respectfully submitted,

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